July 1, 2002

National Highway Traffic Safety Administration
Docket Management Facility
400 Seventh Street, SW
Room PL-401
Washington, DC 20590

Re: Docket No. NHTSA 2002-12150
(Confidential Business Information, 49 CFR Part 512
Federal Register Vol. 67, No. 83, 21198, April 30, 2002)

Dear Sir or Madam:

The Motorcycle Industry Council (MIC) is the national nonprofit trade association representing the manufacturers and distributors of motorcycles, their parts and accessories, and members of allied trades. On behalf of our member companies, we hereby submit the following comments on the Agency's Notice of Proposed Rulemaking on "Confidential Business Information," 49 CFR Part 512.

A Presumption of Confidentiality as Pertains to Disclosure of "Early Warning" Information and Class Determinations.

The Council applauds any effort by NHTSA to simplify and bring clarity to its regulations. However, we are concerned that the various proposed new provisions intended to ensure efficiency in the processing and protecting of sensitive business information stray from this laudable goal. As proposed, they depart from long-standing and workable practices, are over-reaching, and with respect to information submitted to the Agency in compliance with the Transportation, Recall Enhancement, Accountability and Documentation Act, contrary to statute. NHTSA's protocol for obtaining information from the private sector is viewed as one of cooperation and trust. It will continue to be successful as long as it remains based on the Agency's demonstrated ability to protect material from public disclosure when such information customarily is not disclosed by the submitting party, or when the information, if released, would cause competitive harm to the submitter. Any material change in this approach, particularly with regard to compelled information, would have a deleterious effect and likely inhibit the process.

The Agency asked for comment on whether material submitted under "early warning" should or should not be afforded confidential treatment. It is our view that NHTSA should presumptively determine that the vast majority of the information to be submitted under "early warning" is confidential and should be protected. The TREAD Act ascribes a presumption of confidentiality to "early warning" information and the Agency should not disregard this constraint out of hand by attempting to unilaterally establish neat, one size fits all "class determinations". The millions of data points and thousands of pieces of paper that continuously will be flowing into, through and out of NHTSA's TREAD information processing apparatus will be anything but neat.

The Council agrees with the proposed §512.23(a)(3); however, we disagree with Appendix B subsection (b), that all the material, per se, submitted to the Agency under early warning, in the four classes of

information prescribed, would not cause harm and therefore is to be released. There most certainly will be information deserving of protection in the overwhelming volume of material required to be submitted and protection must be afforded before the fact since it can't be done afterwards. We believe the Agency has a responsibility to review and evaluate all compelled information for confidentiality prior to its public availability.

Information that is compelled is firstly for the use of the Agency in complying with the requirements of Congressional mandates and should not automatically and simultaneously be available to the public at large. Only after the purposes for which the information was compelled have been satisfied within the Agency should public release be contemplated. Legitimate public access is not to be denied but it must stand second in line in the process and subject to due deliberation. To do otherwise would be no different than for the Agency to require submitters to simultaneously provide copies to whomever purports to represent the interests of "citizens, consumers, the media, et al".

The processing of TREAD "early warning" information is inextricably linked to Part 512. The Agency should not try to carve out certain categories or classes of information for distinctive treatment by denying an appropriate level of scrutiny that would normally be used in determinations regarding protection. As is noted in the discussion of Subpart D - Agency Determinations, the Agency has the authority to issue "class determinations" and has done so by establishing three classes that are eligible for confidential treatment. We agree with these historical classes and that NHTSA does indeed have the authority to make them. However, we do not agree that the underlying statute contemplates the Agency making similar determinations that establish classes of information that are not eligible for confidential treatment. Part 512 is aptly titled "Confidential Business Information" and should not extend to "Business Information that is not Confidential".

In the NPRM on the TREAD Act "early warning reporting requirements," under the discussion of "disclosure," the statement that "the Agency does not expect to receive many requests for confidential treatment for submissions under the early warning reporting requirements of the TREAD Act," is made. This appears to have been preemptive in nature and perhaps a justification for the position now being put forth by the Agency. MIC disagreed with it then and disagrees with it now. A significant amount of information and data produced under this program will be of great interest to many outside the Agency and we would expect the Agency to exercise the same degree of care as is the current experience. We particularly would not want to see a policy emerge, stated or unstated, that discourages submission of information for appropriate protection, distorts the process, or that does not provide for protection where confidentiality is deserved.

The Agency is compelling a large amount of information that could in many instances include not only personal data, for which labor intensive redacting is proposed, but internal business information that is unrelated to TREAD or to matters of safety. For example, motorcycle production and sales information by model has generally never been made publicly available, nor has aftermarket production of parts, components, equipment, or accessories. We are not aware of any safety implications that have arisen as a consequence.

The plethora of information regarding customer satisfaction and product quality that is required quarterly constitutes a huge reservoir of material to be plumbed by those with agendas not necessarily related to matters of safety. Much of the information certainly will be safety related, but some will not. Some will be material to the issues, some not. Much will be factual, some will be fiction. As such, these submissions regarding warranty claims, consumer complaints, property damage claims and field reports should be afforded protection subject to selective review for release and not released en masse. It is our view that NHTSA should not disclose any "early warning" information unless and until the Agency makes the required determination under Section 30167(b).

Submission Requirements Generally

Provision of three versions of information. The Agency's proposal to change the requirements for submission of material asserting a claim for confidentiality to "minimize the burden on submitters" and provide other offices with immediate information will have the opposite effect. The existing protocol works well in providing the Chief Counsel with the material and information needed to evaluate a claim for confidential treatment and does not need fixing. The only justification we can see for requiring three separate versions of a submission to the Agency is to shift the burden of administrative document control and management from the Agency, where it appropriately resides, to the submitter where it does not. The proposal that would require submission of three different versions of submitted information – one complete version, one redacted version, and one containing confidential information only would accomplish no useful end whatsoever. The "confidential" only submission would be information out of context and the full version would need to be referred back to in order to make any sense out of the submission. Provision of this third version only serves to add substantially to the cost, hours and paperwork burdens with absolutely no offsetting benefit.

We believe the requirement that the submitter shall also include any non-confidential information that the Chief Counsel might need to make a determination wrongfully places responsibility on the submitter to somehow be able to determine correctly what the Office of Chief Counsel will conclude to be necessary. In our view, the document at issue, the request for confidential treatment and the certificate in support thereof would seem to be sufficient for counsel to make a determination. Additional information as appropriate would always be provided on request.

Redaction of Personal Information. The proposal "requests" that personal information included in the submission be redacted by the submitting entity. The Council strongly disagrees with this approach. In our view the shifting of this task to the submitter would be an abrogation of the government's responsibility under the Privacy Act. We fail to see any benefit to the Agency that would offset the large downside to the submitter. What we do see is a distortion of the process. If redaction is performed by the submitter, the submitter then becomes liable for properly protecting personal information as an agent of the Agency. This is not where we want to be nor do we believe it was contemplated by the Privacy Act. The liability exposure here belongs to the government. Recognizing this, the Agency would certainly continue to review all submissions to assure itself that the necessary redaction was in fact accomplished as appropriate. The Agency would also have to review all submissions to ascertain whether any redaction was done at all, as this proposal is a "request". We don't believe any efficiencies will be achieved. Rather, the burden will be increased not decreased, since the submitter will now be required to provide twice as much paper, further contributing to the size of the mountain.

Duty to Amend Prior Submissions. This proposal constitutes a major and burdensome change to the existing rule and should not go forward. The Agency is proposing penalties on submitters for failing to amend if they know or become aware that the information was incorrect at the time it was provided to NHTSA, or that the information, although correct when provided to NHTSA, is no longer correct. This is an unnecessary departure from the current "knowing concealment" standard which is straightforward, reasonable and works.

By contrast, the proposal would impose a new requirement on submitters to establish and maintain a program to constantly monitor the status of submitted material to determine whether any information claimed to be confidential might, somehow have been published, released or otherwise disclosed. In order to avoid civil penalties, submitters would be forced to monitor the confidential status of submitted information ad infinitum, far beyond anything contemplated by the Freedom of Information Act. We are not aware that the Agency has encountered any difficulty with the existing system or that it has been

abused. Adequate procedures are in place for challenging the confidential status of information or its continued protection by anyone at any time.

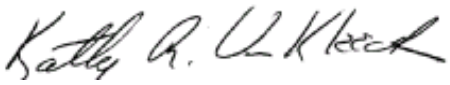
Time Limits for Actions and Responses

At § 512.18, .19, .22 and .23 time limits are established for various actions and responses. In all cases they are ten (10) days after… or from…or before a particular action. Two problems are evident. First, it will be difficult to determine a date certain when the time begins or ends and second, is the difficulty of providing or receiving whatever is required within a short ten-day limit. In the instance of a denial for confidential treatment, the information will be released not less than ten working days after the submitter has received notice of the denial. This raises the question of how the Chief Counsel will know when the submitter received the notice. The same or similar imprecision pertains to the other sections noted. While this is certainly more fair than to use a "date of this letter" approach, it also would seem to argue for a window larger than ten days.

Serious consideration should be given to the existing realities of communicating with NHTSA or any other Agency located in Washington, DC. Security issues surrounding mail handling have made the reliable delivery and receipt of letters and packages problematic at best. This environment will no doubt persist well into the future and certainly be a factor that must be considered when establishing time frames. In recognition of the foregoing, the Council requests that all ten (10) day references in the proposal be revised to a minimum of thirty (30) days.

Thank you for your consideration of these comments on this rulemaking, which is of vital importance to our member companies.

Respectfully submitted,



Kathy R. Van Kleeck
Vice President
Government Relations